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PACIFIC TELESIS
Group-Washington

March 13, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Dear Mr. Caton:

Re: *CC Docket No. 96-21, Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services*

On behalf of Pacific Telesis Group, please find enclosed an original and six copies of its *"Comments"* in the above proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

Alan Ciamporcero

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services	CC Docket No. 96-21

COMMENTS OF PACIFIC TELESIS GROUP

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Summary

No rulemaking is required to find that a separate affiliate of an "exchange telephone company" is nondominant in the provision of any interstate, interexchange service. The Commission already reached this conclusion in the Competitive Carrier proceeding. We believe its holding in Competitive Carrier applies to the separate affiliates of all "exchange telephone companies," including the BOCs. Nothing has changed to affect this holding. The Commission should quickly confirm its long-standing position.

In the 1996 Act, Congress expressly avoided imposing a separate affiliate requirement on out-of-region interLATA services. Congress intended the BOCs to be able to offer out-of-region services "immediately" after the date of enactment, not after a rulemaking or a dominant carrier tariff notice period. There simply is no credible scenario that explains how the BOCs could dominate the out-of-region interLATA market.

We believe the Commission's policy should be to assure that all interLATA competitors are subject to the same degree of regulation and meet the same safeguards. For the time being, this mitigates in favor of applying the Competitive Carrier rules to the interLATA affiliates of all exchange telephone companies, including the BOCs. As the Commission observes, these rules are "well-established" and have never led to complaints of anticompetitive behavior. Separate affiliate requirements for in-region interLATA and for non-dominant treatment of out-of-region interLATA must eventually be eliminated. But to maintain a level playing field, all separate affiliate requirements should be eliminated at the same time.

The Commission also requests comment on whether the affiliate transaction rules should apply to the BOCs' interLATA affiliates. For the time being this too is acceptable. However, if the Commission succeeds in its long term goal of eliminating sharing from the price cap rules, there is no reason to require affiliate transaction valuation rules to apply between exchange carriers subject to price cap regulation and their nonregulated or deregulated affiliates.

Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services	CC Docket No. 96-21

COMMENTS OF PACIFIC TELESIS GROUP

Pacific Telesis Group, Inc. hereby respectfully comments on the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1] In the Notice, the Commission considers whether the BOCs should be regulated as dominant or nondominant carriers with respect to the provision of out-of-region interstate, interexchange services.[2] It tentatively concludes that if a BOC provides out-of-region services through an affiliate that satisfies the separation requirements established in the Competitive Carrier proceeding, the BOC should be regulated as a non-dominant carrier. The Notice "does not address BOC provision of in-region, interexchange services." Notice, para. 1.

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[1] *Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services,* CC Docket No. 96-21, Notice of Proposed Rulemaking, FCC No. 96-59 (released February 14, 1996) ("Notice").

[2] "Out-of-region services" are defined as all interstate, interexchange services (including interLATA and intraLATA services) that are not "in-region," as defined in the Telecommunications Act of 1996 (Pub. L. 104-104, 110 Stat. 56) (the "1996 Act"). Notice, para. 1 and n.2.

I. The BOCs' Separate Affiliates Are Nondominant in the Provision of All Interstate, Interexchange Services.

The Commission deserves to be commended for attending promptly to the implementation of the 1996 Act. However, we do not believe that any rulemaking is required to find the BOCs nondominant in the provision of any interstate, interexchange service through a separate affiliate.

In the Competitive Carrier docket, the Commission decided that "the domestic, interexchange, interstate services of all carriers affiliated with exchange telephone companies should be regulated as nondominant."[3] The BOCs undoubtedly are "exchange telephone companies." The holding of Competitive Carrier was not, as the Notice appears to suggest, limited to interexchange carriers affiliated with "*independent* LECs."[4] The words "independent LEC" do not appear in the Competitive Carrier decisions. The Commission said,

> We hereby explain what we meant by an "affiliate" of an exchange telephone company for purposes of qualifying for regulation as a nondominant carrier. A carrier affiliated with an exchange telephone company is a carrier that is owned (in whole or part) or controlled by, or under common ownership (in whole or part) or control with, an exchange telephone company.[5]

The Commission was not using language imprecisely. It meant "exchange telephone companies" in its customary sense of including the BOCs. In a note that accompanied the paragraph quoted above, the Commission observed that it had "required that the BOCs employ structural separation for the provision of customer-premises equipment (CPE) and enhanced services," but

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[3] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor,* 98 F.C.C.2d 1191, para. 6 (1984).

[4] Notice, para. 4 (emphasis added).

[5] 98 F.C.C. 2d 1191, para. 9.

that it had "not required structural separation for the *other* exchange telephone companies' CPE activities and enhanced services."[6]

In the same note, the Commission said that if the BOCs were ever allowed to provide interLATA services, it "would regulate the BOCs' interstate, interLATA services as dominant until we determined what degree of separation, if any, would be necessary for the BOCs or their affiliates to qualify for nondominant regulation."[7] We do not believe this *dictum* was intended to override the holding of Competitive Carrier. There is no reasoned explanation for why structural separations could entitle the affiliates of some "exchange telephone companies" to nondominant status, but not others. However, if anyone doubts that the holding of Competitive Carrier will apply to the BOCs' interLATA affiliates, a declaratory ruling may be sought.[8] Or the Commission could issue a public notice or declaratory ruling that the Competitive Carrier holding applies to the BOCs and their affiliates. Even if any ambiguity exists, a time- and resource-consuming rulemaking is not necessary to resolve it.[9]

That the BOCs' interLATA affiliates are nondominant is also consistent with the 1996 Act. It requires that, for three years, in-region interLATA may be provided through an independently operating affiliate, subject to other safeguards over and above what Competitive Carrier requires.[10] Congress intended the 1996 Act to be "de-regulatory" and to "open all

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[6] *Id.* at n.23 (emphasis added).

[7] *Id.*

[8] See *In re BellSouth Petition,* 6 FCC Rcd 3336, para. 26 (1991). See also 47 CFR Section 1.2.

[9] Section 401 of the 1996 Act also requires the Commission to forbear from applying any regulation or any provision of the statute upon making certain findings. Public notice or comment is not required. See 47 U.S.C. Sections 160, 161.

[10] See 1996 Act, Section 272.

telecommunications markets to competition"[11] -- not to re-impose dominant regulation on a market from which it was recently removed. Congress also left the Commission no discretion to modify or delay the timing of the BOCs' in-region interLATA entry. The only provisos on that entry are in Section 271. The Commission must determine whether a BOC has met the requirements in Section 271 for in-region services within ninety days of receiving an application.[12] If the Commission approves the application, the 1996 Act says without qualification that the BOC "may provide interLATA services originating in any of its in-region States."[13] The Commission may not "limit or extend" the competitive checklist.[14] Nor may it grant an application subject to conditions. A House provision that would have let the Commission do so was pointedly dropped by the Conference Committee.[15] In short, Congress contemplated no additional waiting periods, as could be required under dominant regulation.

II. Out-of-Region InterLATA Services Present No Market Power Issues.

The Commission imposes dominant regulation on carriers that can exercise market power.[16] By this standard, it is abundantly clear that out-of-region interLATA services are nondominant. Whether the services are provided through a separate affiliate or not, there is

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[11] See 104th Cong., 2d Sess., H.R. Report 104-458 ("Conference Report"), p. 1.

[12] 1996 Act, Section 271(d)(3).

[13] 1996 Act, Sections 271(b)(1), (2).

[14] 1996 Act, Section 271(d)(4).

[15] See Conference Report, pp. 146, 149. Also included in the Commission's mandatory determination under Section 271 is whether the provision of in-region interLATA services would be "consistent with the public interest, convenience, and necessity," eliminating the need for a separate application for any authority that would otherwise be required under Section 214. See 1996 Act, Section 271(d)(3)(B).

[16] Notice, para. 2.

simply no credible scenario for us to dominate the out-of-region interLATA market. We have no wireline facilities out-of-region and no market share. We will have to depend on our *deregulated* competitors for facilities to resell. As the Commission acknowledges:

> In our recent AT&T Order we found that there is a significant excess capacity in this market and that there are a large number of long-distance carriers, including four nationwide, facilities-based competitors, AT&T, MCI, Sprint, and WorldCom; dozens of regional facilities-based carriers; and several hundred smaller resale carriers.[17]

In the 1996 Act, Congress expressly declined to impose a separate affiliate requirement on out-of-region interLATA services. Congress intended the BOCs to be able "to offer out-of-region services *immediately* after the date of enactment,"[18] not after a rulemaking or a dominant carrier tariff notice period.

III. The Competitive Carrier Rules Are Acceptable On An Interim Basis Until All Separate Affiliate Requirements Are Eliminated.

We believe the Commission's policy should be to assure that all interLATA competitors are subject to the same degree of regulation and meet the same safeguards. For the time being, this mitigates in favor of applying the Competitive Carrier standards to the interLATA affiliates of *all* exchange telephone companies, including the BOCs, whether services are in-region or out-of-region. As the Notice says, the rules are "well-established."[19] To our knowledge, though the standards have applied for over a decade, there have been no complaints of anticompetitive conduct.

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[17] *Id.* at para. 8.

[18] Conference Report, p. 147 (emphasis added). "Immediately" means "without lapse of time; without delay; instantly; at once." *The Random House Dictionary of the English Language*, 2d ed. unabridged (1987), p. 957.

[19] Notice, para. 14.

Our region will be a magnet for competitors. California has relatively low basic rates, the lowest access charges in the nation, and therefore relatively high interLATA toll margins. As long as we must provide in-region interLATA services through a separate affiliate, regulatory symmetry requires that newly authorized LECs from other regions offer competing service through a separate affiliate. We will do so in other regions as long as the in-region separate affiliate requirement remains.

The Commission has expressed concern on various occasions about the inefficiencies that may result from structural safeguards.[20] Structural separation may impose a "direct monetary cost" on consumers.[21] On other occasions, the Commission has referred to the anticompetitive effect of dominant regulation. For example:

> Tariff posting ... provides an excellent mechanism for inducing noncompetitive pricing. Since all price reductions are public, they can be quickly matched by competitors. This reduces the incentive to engage in price cutting. In these circumstances firms may be able to charge prices higher than could be sustained in an unregulated market. Thus, regulated competition all too often becomes cartel management.[22]

Eventually, therefore, the separate affiliate requirement will have to be lifted. But to avoid creating an uneven competitive landscape, the Commission should lift the requirement from everybody at the same time.

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[20] See, for example, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 10 FCC Rcd 8360, para. 5 (1995).

[21] *Computer III Remand Proceedings*, 6 FCC Rcd 7571, para. 8 (1991). The Commission appears not to have weighed the costs of the separate affiliate requirement against its benefits, as agencies are required to do. See Executive Order 12866 (Sept. 30, 1993) (3 CFR 638).

[22] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor,* 84 F.C.C.2d 445, para. 26 (1981).

One of the Competitive Carrier rules has been inaccurately paraphrased in the Notice. The Commission says that an interLATA affiliate should "obtain any BOC exchange telephone company services at tariffed rates and conditions."[23] In accordance with the Commission's affiliate transaction rules, we believe this means "services provided to an affiliate pursuant to a tariff."[24] The Commission's paraphrase may have been correct when first made in the Competitive Carrier proceeding, but since then various exchange services, both state and interstate, have been detariffed.[25] We do not believe, for example, that the Commission intended to prohibit our local exchange carriers from billing calls for our interLATA affiliate, though it could bill calls for all other interLATA providers. Both state and Federal law require that all of our common carrier services continue to be offered on a nondiscriminatory basis.

IV. For the Time Being, InterLATA Affiliates May Be Treated as Nonregulated Affiliates for Accounting Purposes.

The Commission notes that independent local exchange carriers providing interexchange services through affiliates pursuant to the Competitive Carrier standards treat those affiliates as nonregulated affiliates for exchange carrier accounting purposes. It seeks comment on whether a BOC affiliate providing out-of-region, interstate, interexchange services should be treated as a nonregulated affiliate for BOC accounting purposes.[26]

For the time being, interLATA affiliates of all exchange carriers should be treated as nonregulated affiliates under the affiliate transaction rules. We note, however, that the

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[23] *Id.* at para. 13.

[24] See 47 CFR Section 32.27(d).

[25] See, for example, *Detariffing of Billing and Collection Services,* 102 F.C.C.2d 1150 (1986).

[26] Notice, para. 13.

Commission's long term goal is to eliminate sharing from the price cap rules.[27] With sharing eliminated, there would be no reason to require affiliate transaction valuation rules to apply between exchange carriers subject to price cap regulation and their nonregulated or deregulated affiliates, since exchange carriers would have nothing to gain by shifting the costs of nonregulated ventures to regulated accounts.[28]

Respectfully submitted,

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Date: March 13, 1996

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[27] *Price Cap Performance Review for Local Exchange Carriers*, 10 FCC Rcd 8961, para. 193 (1995).

[28] See *National Rural Telecom Ass'n. v. FCC*, 988 F.2d 174, 178 (D.C. Cir. 1993); and *Policy and Rules Concerning Rates for Dominant Carriers*, 4 FCC Rcd 2873, para. 104 (1989).